Newsletter

Quaystone

BURGES SALMON

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Welcome to the October edition of Quaystone. This month we focus on transport issues. The UK is on the brink of a potentially enormous investment in transport infrastructure. We consider how the choice of procurement strategy and contract form are likely to influence the development of HS2 and investment in roads. We also have a look at how a recent case clarifies the law on collateral warranties.

Roads: Maintenance and newbuild procurement

A key element of the Chancellor's last Comprehensive Spending Review was £28bn of investment in roads. This figure included £10bn for maintenance which is increasingly seen as critical both in terms of keeping the country moving and providing a regular flow of work for the industry. A big question is how this work will actually be procured.

Framework and long term concession agreements are a popular option for the procurement of maintenance of utilities generally, and of roads in particular. These agreements come in all shapes and sizes, ranging from simple Local Authority framework agreements to the Highways Agency's Asset Support Contracts. The ultimate in scale and complexity is the 30 year M25 DBFO. Let in 2009 it is the world's largest privately financed road contract.

The Government's announcement was light on the detail of how the backlog in maintenance will be procured. Generally speaking the Highways Agency looks after motorways and major trunk roads in England (Transport Scotland and Welsh Assembly Government in Scotland and Wales respectively) with Local Authorities picking up the rest. There is significant scope for sharing experience between Local Authorities as they all face similar issues.

Framework agreement procurement has not had a great press lately with recent review of procedures adopted by the Highways Agency and the Environment Agency. This follows the West Coast Mainline rail franchise debacle last year which highlighted the importance of compliance with EU procurement rules. Even the M25 DBFO has come in for criticism, as those operating it regularly need to make changes to accommodate unforeseeable variations to network requirements and incorporate new technology.

With small margins and a vast maintenance backlog, disputes are inevitable. A recent case involving Atkins

and the DfT is a good example of the sorts of tensions we regularly see in these types of long term relationships. Fortunately most never get anyway near the courts. At tender stage for the maintenance contract, Atkins did not allow for the huge number of potholes it eventually encountered. It sought to recover the extra cost as variations. Its claim was rejected by the court. The result turned on the particular wording of Atkins' NEC3 based contract but it flags one of the key issues that need to be considered by those who are contemplating similar long term agreements.

The key point is that successful procurement and operation of long term contracts, even the least high profile, merits careful consideration of the procurement strategy, project team and EU procurement rules if the parties are to avoid nasty surprises. The longer the contract term the more carefully the drafting needs to be to deal with inevitable changes.

Means of funding is also a critical issue. It is likely that procuring authorities will look again at the various road charging options available to them under the Transport Act 2000 (tolling, congestion charging etc) to fund the more ambitious schemes.

Further information

For further details on the issues raised in this bulletin or generally on the services we offer please email **marcus.harling@burges-salmon.com**, **william.gard@burges-salmon.com** or **steven.james@burges-salmon.com** or your usual Construction and Engineering Group contact.

Procuring HS2: Is alliancing the answer?

Debate on the future of HS2 is hotting up. Critics argue that the current budget is insufficient and that the benefits of the scheme are not enough to justify the expenditure. The Public Accounts Committee has said that the Department for Transport is failing to present a *"convincing strategic case"*. So is it likely to go ahead and what can improve its chances?

Firstly the criticisms have been refuted recently by eight of the leading construction firms involved in the project who insist the project will come in under budget.

With such a huge infrastructure project, the suitability of procurement strategy and contract will inevitably impact on whether it is delivered on time and budget. The last comparable rail project, HS1 (also known as the Channel Tunnel Rail Link or CTRL), gives a benchmark against which to plan the delivery of HS2 and provides some useful "lessons learned".

On HS1, early contractor involvement was adopted where possible and the packages were designed to maximise partnering and alliancing. Project alliancing was used specifically by the tunnel contractors, who created an alliance which essentially provided for a fixed price with no compensation events.

Alliancing means different things to different people, but when implemented correctly (and as shown on HS1), it is a useful method of helping a project to be successfully delivered. Generally, the key feature of an alliance is an agreement between all parties involved to work together and collaborate to deliver the project. It is based on a no-blame culture with no party having any liability to the others for delivery failure. Delivery is a collective responsibility. The advantages of alliancing are that it encourages better co-operation and design integration with specialists in the supply chain, and achieves a level of stability which helps increase confidence in the project overall. Due to the huge

risks involved, in terms of cost and the highly charged political nature of the venture, alliancing could be an attractive option for HS2.

A key consideration will also be the form of contract to be used and how the key risks are managed. Whilst historically the NEC ECC has been used for projects of this type (having been endorsed by the government for public sector use) given the difficulties with the NEC (as we have highlighted in earlier editions of Quaystone), it may be time for a new approach. At the very least, contract amendments which worked well for HS1 could be translated across to HS2. For example, bespoke amendments used on HS1 enabled scope to be taken from one contractor and given to another in the event of non-performance.

It was not all plain sailing on HS1 however. Complex issues arose, often concerning interfaces with other stakeholders such as Network Rail, something which those tasked with planning HS2 will need to be mindful.

It will be important to ensure that the key messages from HS1, and other comparable rail projects, are not lost in developing HS2, particularly in light of the PR battles on the viability of the project and the costs involved.

Collateral Warranties

A recent case[1] sought to answer the question: "is a collateral warranty a construction contract for the purpose of the Construction Act?" The answer, perhaps inevitably, was "maybe". The beneficiary of the warranty was the tenant of a swimming pool. Before starting adjudication against the contractor for faulty air handling equipment it wanted the court to confirm that the warranty was a construction contract and that statutory adjudication applied.

The court decided that the wording of the particular warranty made it a construction contract. The warranty had been entered into before the works had been completed and, pursuant to it, the contractor warranted that he would *"carry out and complete the Works in accordance with the… Contract"*. The court decided that made it a contract for the carrying out of construction operations, and therefore a construction contract for the purpose of the Construction Act. It was not merely a promise that the works, once complete, would be in accordance with the contract.

The wording, and timing, of the warranty in question was not particularly unusual so the principle is likely to mean that a large number of warranties in force today would be classed as construction contracts. The court's clarification may encourage contractors to attempt to further limit the number of warranties they are prepared to provide or tweak their wording to try to avoid them being classed as contracts for construction operations. However, the commercial pressure to win work is likely to trump such concerns for the foreseeable future.

As an aside, if the warranty is a construction contract the payment provisions of the Act should also be implied into it. How that is intended to work was not addressed by the court. Would it give a contractor a legitimate claim for payment against the beneficiary of a warranty if the employer was in default? One for another day.

[1] Parkwood Leisure Ltd v Laing O'Rourke Wales and West Ltd

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